United States Court of Appeals
for the Ninth Circuit

PERRY E. BURNHAM and L. EARL BURNHAM,
Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,
Plaintiff and Appellee.

No. 12648

APPELLANTS' BRIEF

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STATEMENT OF THE CASE

This action was filed in the District Court for Blaine County, Idaho, and was removed to the United States District Court for the District of Idaho, on the ground of diverse citizenship, the subject in controversy exceeding the sum of $3,000.00 exclusive of interest and costs. Section 1332, Title 28, U.S.C.A.

The plaintiff filed an Amended Complaint in which he alleged that he was a licensed real estate broker; (Tr. 9) that

on the 29th day of April, 1948, he was employed by the defendants to procure a purchaser for real estate located in Blaine County, Idaho, known as the Cove Ranch containing approximately 3313 acres of land. The terms upon which the property was to be sold were alleged as: total consideration, $140,000.00, $25,000.00 cash, balance on time. The Agency Agreement is incorporated in the Amended Complaint. It is in the usual form, and there is added on the back of the contract, the following: (Tr. 36)

> "$2,000.00 when the first $25,000.00 is paid and $2,000.00 when the second $25,000.00 is paid, and the remaining $2,000.00 when the full down payment of $70,000.00 is paid on the purchase price of this Cove Ranch, making a total of $6,000.00 commission."

The contract as modified, by changing the amount of the commission and the dates, was signed in Boise, Idaho, on May 12, 1948. There is considerable confusion in the record as to the signing of the instrument prior to the adding of the note, but all agree that the note was signed at the Boise Hotel when a contract for the sale of the property between the appellants and Carl H. Randall, Edward Randall and Oriel Randall was signed.

The contract of sale provided that in lieu of the cash payment, three separate notes would be signed by each of the Randalls—Carl Randall, Edward Randall and Oriel Randall—that each of the notes would be secured by a real estate mortgage upon farms represented to be owned by the Randalls. The contract provided (Tr. 20) that:

> "Said mortgages to be in usual form, and the status of the Title to the said Real Estate is to be disclosed

by a report of abstractor for the Counties in which the said land is located, showing conveyances affecting the Title to said land since Deeds were received by the respective owners."

Before the signing of the contract of sale and the agency agreement, the plaintiff, appellee herein, took the defendants to three farms, showed them the crops and improvements and represented that the three farms were owned by the Randalls and were of a value of $70,000.00 (Tr. 201). There is no controversy as to the fact. The plaintiff testified to it. Shortly after the contract of sale was signed at Boise, Oriel Randall signed a note for $25,000.00, and furnished a description of his property with an abstract showing the status of the title as provided in the contract. In the course of time, Edward Randall also signed a note and with his wife, a mortgage covering property owned by him. Carl Randall signed a note but furnished no description of his property. The defendants caused an investigation to be made and found that Carl Randall owned no farm. He was on the farm exhibited as his farm as a contract purchaser. The description was never furnished. It appeared during the trial that on June 21, he sold his equity in the property which plaintiff represented to be of a value of $40,000.00 and got $5,000.00, (Tr. 77, 125) used the money to pay debts and to purchase machinery (Tr. 195). Plaintiff knew at all times that Carl Randall had no title to the land, that he was purchasing it on contract (Tr. 77, 83). Shortly after the contract was signed, Carl Randall moved to the ranch. Plaintiff assisted him in doing so, by checking over the livestock and farm implements covered by the contract of sale, attended to the payment of some taxes

and did such other things as he could do to establish Carl Randall on the property (Tr. 62).

During the latter part of May, June and July, while appellants were endeavoring to get their security cleared up, Carl Randall planted grain, irrigated the land, put up hay, maintained a dairy herd on the ranch, and in other respects proceeded as if he had performed his contract. When it was found that Carl Randall could not perform under the original contract because he had no farm, appellants entered into another agreement with the Randalls (Tr. 9) by the terms of which the cattle which were included in the contract of sale were returned to the Burnhams and they waived the mortgage security of his note.

Carl Randal remained on the ranch until the approach of winter in 1948, at which time he abandoned the premises, taking with him all of his livestock, farm implements and all of the removable improvements or additions he had made to the property (Tr. 187). The ranch was left unoccupied during the winter of 1948 and 1949, and up to April 4th of the spring of 1949. For want of care in removing snow from buildings and otherwise protecting the property some of the buildings collapsed (Tr. 14).

The Burnhams, feeling that their ranch was in jeopardy, on April 4th made another agreement with the Randalls under which they released the Randalls from their contract of purchase. Whilethe Randalls were in possession of the property, after the agreement under which the cattle were returned, the Burnhams sold the cattle and they also received the landlord's

share of grain grown. In the aggregate, their returns from the sale of cattle and the sale of one-third of the grain were approximately $25,000.00. The exact amount was not determined by the court. The original contract of sale provided that Burnhams should receive the landlord's share of the grain, and they, at all times, held title to the cattle which were released under the contract of August 12, 1948.

The issues presented to the District Court and now before this Court are as follows:

1. As to whether the failure of Abegglen to reveal the fact that Carl Randall had no farm of record to which he could show an abstract disclosing conveyances or entries affecting title to the farm *from the date of the deed to him,* and misrepresentations respecting the value of the farm constituted such misconduct on the part of the agent as would bar a recovery of the commission.

2. As to whether in the circumstances the Burnhams subjected themselves to liability for the full commission by modifying the agreement and taking back the cattle or by making the agreement of April 4, 1949, releasing the Randalls from the contract of purchase of the ranch.

3. As to whether the application of the landlord's part of the wheat crop and the proceeds from the sale of the cattle constituted such a payment on the contract as would subject the Burnhams to an obligation to pay $2,000.00 on account of the commission.

The District Court resolved these issues in favor of the plaintiff and against the defendants.

See opinion (Tr. 35) and Finding No. 9

> "That the plaintiff was free from misconduct, concealment or misrepresentations in all dealings with the defendants."

and Conclusion of Law No. 3:

> "The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls."

Appellants contend tht neither the finding of fact nor the conclusion of law is supported by the evidence.

The court further found that the mutual modification of the original agreement by the contract of August 12, 1948, was such a waiver as would entitle plaintiff to the full commission. Finding No. 6.

That the rescission of the original contract on April 4, 1949, releasing the Randalls was made without the knowledge, consent or approval of the plaintiff, (Findings 7 and 8) and operated as a waiver of any right the Burnhams had to rescind the original contract on account of "any claim, misconduct, concealment or misrepresentation of the plaintiff in effecting the sale of the said property for the defendants, and "waived the right to successfully assert any misconduct, misrepresentation or concealment on the part of the broker in bringing about the sale of the said property." And further, that defendants abandoned the sale of said property and the payments upon the purchase price were obviated and plaintiff's full

commission was forthwith matured and become payable (Finding 6).

The appellants claim that the court was in error in finding and concluding that the modification of the contract on August 12th and the taking back of the cattle and the rescission of the contract on April 4, 1949, operated as a waiver of their rights growing out of the asserted concealment and misrepresentation on the part of the plaintiff in withholding from them the facts pertaining to the ownership of the farm shown to them as Carl Randall's farm and misrepresentations with respect to the value of the property.

The appellants contend that the rights of the parties, appellants and appellee herein, are to be determined as of the date of the making of the contract of sale and the agency agreement, to-wit: May 13, 1948. Having become involved with the Randalls through the misrepresentations and concealments of the plaintiff, appellants claim that they had a perfect right without obligating themselves to the plaintiff to extricate themselves and save their property as best they could. The propositions, therefore, to be argued are as follows:

1. That plaintiff grossly misrepresented the value of the Randall's ranch as being $70,000.00 and concealed from the appellants a fact which he, at all times knew, and which is not in controversy, that Carl Randall did not have title to the farm shown appellants by plaintiff as Carl Randall's farm.

2. That appellants, having become involved in permitting the Randalls to go into possession of the ranch and livestock upon the representation that each of the Randalls owned

farms exhibited to them, had a right to modify the contract, change the security and ultimately to rescind it without subjecting themselves to liability to the plaintiff for a commission.

3. At all events plaintiff was not entitled to more than $2,000.00 for not more than $25,000.00 was paid, about one-half of which was received from the sale of Burnham's cattle and Randalls had breached the contract by abandoning the property. The court erred in making Finding No. 7 to the effect that the " . . . purchasers (the Randall Bros.) were not in default on the contract of purchase in any respect," and in Conclusion of Law No. 6 to the same effect.

ARGUMENT

I

PLAINTIFF GROSSLY MISREPRESENTED THE VALUE OF THE RANDALL'S RANCH AS BEING $70,000.00 AND CONCEALED FROM THE APPELLANTS A FACT WHICH HE, AT ALL TIMES KNEW, AND WHICH IS NOT IN CONTROVERSY, THAT CARL RANDALL DID NOT HAVE TITLE TO THE FARM SHOWN APPELLANTS BY PLAINTIFF AS CARL RANDALL'S FARM.

SUMMARY OF ARGUMENT

The testimony is somewhat in conflict as to what was said and done at the meeting at the Boise Hotel in Boise on

May 11th, and particularly as to whether any statement whatsoever was made to the effect that Carl Randall was buying the farm shown to the Burnhams by Abegglen upon a contract, but the agency agreement and the contract of sale, we think, must be considered as a record of that meeting. The testimony is without conflict that the contract of sale by the Burnhams to the Randalls was read and discussed in the presence of Abegglen after which it was signed by the Burnhams and Randalls. Carl Randall immediately went into possession of the property, and Abegglen aided him in making inventories, paying water assessments and otherwise beginning his farming operations. Furthermore, the testimony is without conflict that Abegglen told Burnhams "that in the three Randall ranches they had a $70,000.00 equity" (Tr. 201).

That is Abegglen's testimony. Abegglen further testified (Tr. 77) that he had visited the Carl Randall ranch, and

"Q. The testimony was that at the time it was worth $40,000.00?

A. That was the appraised valuation that Mr. Randall gave.

Q. Did it look to you to be worth that amount?

A. It looked pretty good to me.

Q. Did you know whether Mr. Randall had title to that?

A. I was advised that he did not.

Q. Were you advised who did have title?

A. No, sir; I knew that he was buying it on a contract.

Q. Did you know from whom he was buying it?

A. No, sir."

Again (Tr. 79-80):

"Q. The mortgages were to be executed by the three Randall brothers, Oreal, Carl and Edward?

A. That is right.

Q. The property to be mortgaged was the $40,000.00 ranch at New Plymouth?

A. That is correct."

The New Plymouth ranch is the property shown as the Carl Randall farm. The position of the appellants is that a duty rested upon Abegglen, as the agent of the Burnhams, to disclose to them in a proper way at the time the contract was being read, that Carl Randall did not have the legal title to the ranch and that no abstract showing the status of the title from the date of the deed to him could be furnished to the Burnhams; that in failing to disclose that fact at that time and in cooperating with the Randalls in putting them in possession of the property, Abegglen was guilty of fraudulent concealment. The concealment was material because Burnhams were delivering to the Randalls approximately $40,000.00 worth of cattle and farm equipment in reliance upon this security which Abegglen considered to be of a value of $40,000.00.

The court erred in Finding No. 9 which is not fully shown on page 48 of the brief, and which reads as follows:

"That plaintiff was free from misconduct, concealment or misrepresentation in all of his dealings with the defendants."

and in drawing Conclusion of Law No. 3:

"The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls."

The contract sued upon in this case reads:

"In consideration of your agreement to list the property and to use your efforts to find a purchaser, I hereby appoint and constitute you my agent with right to sell the following described property for a period of Sixty days from date hereof, and thereafter until you receive from me a written notice terminating this agency and agreement" (Tr. 6).

That established the confidential relationship between Abegglen and the Burnhams and carried with it the duties of an agent to disclose all of the facts within his knowledge affecting the value of the property.

In Porter v. Buckley, 127 Oregon 22, 270 Pac. 905, the court said:

". . . It should require no citation of authorities that an agent who undertakes to contract with his principal must make a full, fair and frank disclosure of the facts concerning the transaction. It will not do to obtain knowledge while acting as the agent and use it to the detriment and damage of the principal."

and in 2 Mechem on Agency, 2nd Edition, Section 2411, page 1974, the rule is stated as follows:

"Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. This rule clearly requires that the broker shall not cheat or defraud his principal in any dealings which they may have together or deceive him to his injury by false statements or representations, or allow his principal to be injured in his dealings through the broker by reason of any concealment or suppression by the broker of information necessary for the principal to have for the protection of his own interests. But the broker's duty also goes further. He must not assume or continue the relations, if his duty to his principal and his own interests will come in conflict. It is his duty, therefore, to freely and fully disclose to his principal at all times, the fact of any interest of his own, or of another client, which may be antagonistic to the interests of his principal, and he will not be permitted to take advantage of his situation to make gain for himself by forestalling or undermining his principal."

Wadsworth v. Adams, 138 U. S. 380, 34 L. Ed. 984-986

"We cannot give our assent to the proposition that Adams, being a special agent only, was not guilty of a breach of duty in withholding from his principal information of the fact that McComb was willing to take the notes at a discount of eight per cent per annum, that is, for $380,000.00, provided he could not get them for $350,000.00. That fact came to his knowledge before he and McComb separated on the 27th of March, and good faith, upon his part, required that he should at once, with the utmost dispatch, have communicated it to his principal, and not have permitted him—pressed for money, as Adams knew him to be and as he took care to inform McComb he was—to consider the offer of $350,000.00, in the belief that that was the highest price his agent could obtain for the notes."

The burden is upon the agent to show that he acted in perfect good faith and was not guilty of concealment.

Triggs v. Jones, 46 Minn. 277, 48 NW 113

Balls v. Moseley, 150 Ark. 210, 211 SW 1084

Featherstone v. Thorne, 82 Ark. 381, 102 SW 196

If it is be claimed that the defendant in good faith thought he had informed the defendants or their attorney of the fact that Carl Randall had no property upon which he could give a mortgage, still his duty was not fully performed because it was a continuing duty to keep the defendants informed as to the facts.

In Holmes v. Cathcart, 88 Minn. 213, 92 NW 956, 6 LRA 734, 97 Am. St. Reps. 513 the court said:

> "He (agent) is bound to the exercise of the most perfect good faith and to keep his principal informed of facts coming to his knowledge affecting his rights and interest."

McBride v. Campredon, 24 N. Mex. 323, 171 Pac. 140, LRA 1918

McMurray v. Garnett, 182 SW 128, not reported in State Reports

Pacific Vinegar and Pickle Works v. Smith, 162 Cal. 507, 93 Pac. 85

Wilcox v. Reynolds, 169 Okla. 153, 36 Pac. 2nd 488

Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 596

ARGUMENT

II

APPELLANTS, HAVING BECOME INVOLVED IN PERMITTING THE RANDALLS TO GO INTO POSSESSION OF THE RANCH AND LIVESTOCK UPON THE REPRESENTATION THAT EACH OF THE RANDALLS OWNED FARMS EXHIBITED TO THEM, HAD A RIGHT TO MODIFY THE CONTRACT, CHANGE THE SECURITY AND ULTIMATELY TO RESCIND IT WITHOUT SUBJECTING THEMSELVES TO LIABILITY TO THE PLAINTIFF FOR A COMMISSION.

SUMMARY OF ARGUMENT

Immediately after the signing of the contract, on May 12, 1948, the Randalls went into possession of the Cove Ranch, began farming operations and mingled their cattle and farming implements with those covered by the contract of sale. The Burnhams might have rescinded the Randall contract in its entirety and repossessed the ranch, but complications might have resulted in litigation which the Burnhams wished to avoid. Insofar as the plaintiff was concerned, the damage had been done and the Burnhams had a right to extricate themselves from the complications with the Randalls as best they could and without any concern whatsoever on the part of the plaintiff because he was responsible for getting them in that predicament. Likewise, after Carl Randall had moved from the ranch taking with him the property he had put on it

and with every evidence of abandonment, the Burnhams had a right to enter into a contract of rescission of the entire agreement in order to save themselves from further losses, and this, without regard to the plaintiff for the reasons above stated. The status of the contract as between the Burnhams and the plaintiff was fixed as of May 12, 1948, when the contract was signed. It was then that the plaintiff was guilty of concealment and misrepresentation and while it was his continuing duty to advise the Burnhams of the fact which he at all times knew that Carl Randall had no farm, the Burnhams had the right to act as if their contractual relations with the plaintiff ended with the misrepresentations.

ARGUMENT

In 1 Mechem on Agency, Section 1207, page 882, it is said:

> "As has been already seen, it is absolutely essential, when an agent undertakes to sustain dealings with his own principal, that it shall appear that the agent frankly and freely gave to his principal full information respecting, not only the agent's relations to the contract, but also, the various conditions respecting time, value, situation, condition and the like, which may fairly be deemed to be material in determining upon the desirability of entering into the contract. But even where the agent is not personally interested in the contract, his duty to give the principal full information of all the material facts relating to the transaction, which are within his knowledge, still exists. A failure to perform this duty, while not necessarily rendering transactions with third persons voidable,

> as it would do if the agent were himself personally interested, will still make the agent liable to the principal for any losses which he has proximately sustained thereby."

The district court was in error in holding that because the Burnhams saw fit to make the second agreement as of August 12th, in view of the situation as it then existed with the Randalls in possession of their property, that they thereby waived the right to rescind or that the plaintiff acquired a right to enforce the agency agreement.

The rule to the effect that the broker is entitled to his compensation when he finds a purchaser "able, ready and willing" to buy the property is not applicable.

The two ocntracts—the contract of agency and the contract of sale—were separate and distinct. While the agency contract was clearly dependent upon the contract of sale, it was a different contract. It is true that Abegglen found the Randalls who were supposed to be ready, willing and able to purchase the property by the giving of the three mortgages upon the three farms, which the plaintiff represented the three Randalls owned. Carl Randall, having no farm, prevented the purchasers from making the contract. If the negotiations had ended there, and if during the life of the agency agreement, negotiations had been taken up between the Burnhams and the Randalls aside from the misrepresentations and if no complications had resulted from the misrepresentations, and a contract satisfactory to the Burnhams had been made, possibly the rule would apply and Abegglen would be entitled to his commission. That was not the case. Abegglen and

the Randalls had represented that they owned the three farms—the Randalls, by the signing of the agreement, and Abegglen, by taking Burnhams to the Carl Randall farm and showing it as Carl Randall's farm. In reliance upon this assurance, Burnhams permitted the Randalls to go into possession of their ranch and livestock. Abegglen participated in putting them in possession. The representation as to the ownership of the farm was material to the extent of $40,000.00. The record discloses that Burnhams would not have entered into any contractual relations with the Randalls had they known that Carl Randall had no farm. The showing to them of a farm in the possession of Carl Randall and which Abegglen knew he did not own, as the farm of Randall, was a flagrant misrepresentation and concealment and the concealment continued until the facts were discovered in the latter part of June.

As said by the Supreme Court of Arkansas in

Featherstone v. Thorne, 82 Ark. 381, 102 SW 196, under simliar circumstances:

> "If these facts were true (concealment) and Thorne attempted wilfully to mislead Featherstone in that way, we are of the opinion that Featherstone was justified in discharging him as agent and that Thorne forfeited his right to claim from Featherstone pay for his services."

It has been and will no doubt be again argued that it was the duty of Burnhams, in their own interest or the duty of their attorney, to examine the record and to have ascertained for themselves whether the representation that Carl Randall owned the farm exhibited to the Burnhams as his farm and in failing

to do so, that they could not be heard to complain. In this connection, the case of

Bishop v. E. A. Strout Realty Company, 182 Fed. 503, Adv. Sheet No. 3, page 503
is very closely in point.

Chief Judge Parker said:

> "We do not think that plaintiffs are precluded of recovery because they accepted and relied upon the representations of Davis as to the depth of the water without making soundings or taking other steps to ascertain their truth or falsity. The depth of the water was not a matter that was apparent to ordinary observation; Davis professed to know whereof he was speaking; and there was nothing to put plaintiffs on notice that he was not speaking the truth. There is nothing in law or in reason which requires one to deal as though dealing with a liar or scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud. The principal underlying the caveat emptor rule was more highly regarded in former times than it is today; but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed. The modern and more sensible rule is that applied by the Court of Appeals of Maryland in Standard Motor Co. v. Peltzer, 147 Md. 509, 510, 128 A. 451, where is was held not to be negligence or folly for a buyer to rely on what had been told him. This is in accord with the modern trend in all jurisdictions which is summed up in A.L.I. Restatement of Torts, Sec. 540 . . . "

ARGUMENT

III

AT ALL EVENTS PLAINTIFF WAS NOT ENTITLED TO MORE THAN $2,000.00 FOR NOT MORE THAN $25,000.00 WAS PAID, ABOUT ONE-HALF OF WHICH WAS RECEIVED FROM THE SALE OF BURNHAM'S CATTLE AND RANDALLS HAD BREACHED THE CONTRACT BY ABANDONING THE PROPERTY. THE COURT ERRED IN MAKING FINDING NO. 7 TO THE EFFECT THAT THE " . . . PURCHASERS (THE RANDALL BROS.) WERE NOT IN DEFAULT ON THE CONTRACT OF PURCHASE IN ANY RESPECT," AND IN CONCLUSION OF LAW NO. 6 TO THE SAME EFFECT.

SUMMARY ARGUMENT

Oriel Randall and Ed. Randall were not on the ranch. They had left the ranch operations to Carl Randall. In November of 1948, Carl Randall moved from the ranch taking with him all of the improvements that he had put on that were removable, and his own livestock and left the ranch wholly without protection except such as a neighbor might give. Some of the buildings collapsed, the motor in one tractor froze up, and in all respects the ranch had the appearance of an abandoned property. In addition to this, Ed. Randall testified (Tr. 69) in reply to a question as to whether he could go on with the contract as follows:

"A. I had no chance whatever to pay.

Q. Could your brothers meet it, the other two that were interested?

A. It is possible that my brother Mike could.

Q. You heard him testify that he had illness in the family that prevented him from going there?

A. Yes, sir.

Q. Did you know of that illness?

A. Yes, sir, I did.

Q. That is one of the principal reasons that he wanted out of the contract?

Oriel Randall testified (Tr. 113-114)

A. That was the main reason that we didn't continue on."

"Q. Were you interested in retaining it under the terms of the contract then in force?

A. Under the old contract?

Q. Yes.

A. Yes, we would have went on if the conditions had not made it such that it looked like it would be better to quit.

Q. What were those conditions?

A. The main objection was my mother became ill, and it was pretty necessary for me to stay and take care of her.

Q. That illness of your mother was what prevented you from going ahead with the contract?

A. That was the main thing and the finance that looked like it would be hard to get; if they

had set the interest back and the fall payment, I think we could go ahead."

While Carl Randall had signed a note, he had paid nothing on it and it was useless to look to him for any participation whatsoever. There is no justification for holding that under these circumstances Burnhams were obliged to further jeopardize their property in order to make a commission for the plaintiff.

The record in its entirety shows that plaintiff, while acting as the defendants' agent, grossly misrepresented the facts as to the ownership and value of the Randall property which he assumed and concealed the facts from the appellants, not disclosing them even after he participated in putting Carl Randall on the ranch. So far as appellants were concerned, they were through with the plaintiff because of the deception. They were confronted with the complication which would either involve them in litigation or loss. Appellants were not required to engage the Randalls in litigation in order to protect themselves as against the plaintiff. Primarily, he was the wrong-doer—not the Randalls. The court clearly erred in deciding and finding that plaintiff was not guilty of misrepresentation and concealment and even though he were that appellants waived their defense by settling with the Randalls without litigation.

Respectfully submitted,

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